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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DONALD MCNEELY, Defendant and Appellant.	D052606 (Super. Ct. No. SCD194654)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed.

Donald Richard McNeely appeals from a judgment entered after the trial court denied his renewed motion for new trial based on misconduct by a juror (Juror No. 8). In an unpublished appellate opinion, this court previously held that McNeely had made a prima facie demonstration of good cause to justify the release of juror information (Code Civ. Proc., §§ 206, 237) and that he should be permitted to inquire with jurors willing to speak about the case to ascertain whether in fact Juror No. 8 had improperly influenced

the jury's deliberations. We vacated the judgment and remanded the matter with directions that the court set a hearing to determine whether personal juror identifying information should be released and to reinstate the judgment if the information was not disclosed after the hearing. Thereafter, the court released the information of four jurors, who when contacted either did not recall the jury deliberations or declined to discuss the case. On McNeely's renewed motion for new trial, the trial court concluded the People rebutted the presumption of prejudice created by Juror No. 8's misconduct, and reinstated the judgment.

On appeal from the reinstated judgment, McNeely again contends he is entitled to a new trial based on Juror No. 8's misconduct during voir dire; that the court erred by ruling the People had rebutted the presumption of prejudice from that juror's assertedly pervasive misconduct. We disagree and affirm the judgment.

PROCEDURAL BACKGROUND

We previously set out the relevant background facts relating to McNeely's convictions and the actions of Juror No. 8, the jury foreman in his case, in our unpublished opinion, *People v. McNeely* (June 14, 2007, D048692) [nonpub. opn.] (*McNeely*).[1] In that appeal, McNeely had argued, inter alia, that the trial court should have granted him a new trial based on Juror No. 8's misconduct, which McNeely argued consisted of Juror No. 8's failure to disclose pertinent background information during

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1 We granted McNeely's unopposed request to take judicial notice of the record in that case.

voir dire and his writings about the trial in an Internet "blog." (*McNeely*, D048692, at [pp. 2-3].) We agreed McNeely had made a prima facie showing of good cause entitling him to a hearing under Code of Civil Procedure section 237 for the release of juror identifying information based on Juror No. 8's manipulative behavior during voir dire, the fact he acted as the foreperson of a jury that reached its verdict late on a Friday afternoon, and indications from his blog writings that he may have "pressured or at least encouraged jurors to reach its verdict through 'compromise or concession to expediency.' " (*McNeely*, D048692, [at pp. 13-14].) Juror No. 8's writings were not evidence of what actually transpired in the jury room, however, and noting that, we nevertheless held McNeely had raised sufficient questions about the integrity of the process to warrant giving him a reasonable opportunity to contact the jurors to ascertain whether *in fact* the juror forced the jury to reach its verdict, prevented full and frank discussions, or exerted any other improper influence on the jury's deliberations. (*McNeely*, D048692, [at pp. 15-16].)

Turning to McNeely's assertion that he was entitled to a new trial, we concluded under the aforementioned circumstances it was premature for the trial court to assess whether the People had rebutted the presumption of prejudice raised by Juror No. 8's misconduct; that the record was not complete on the question in view of McNeely's right to juror identifying information. (*McNeely*, *supra*, D048692 [at pp. 20-21].) We thus vacated the judgment, remanding for the trial court to conduct a hearing under Code of Civil Procedure section 237, subdivisions (c) and (d). (*McNeely*, *supra*, D048692 [at pp. 20-21].) We then held: "If the information is not disclosed after the hearing, the

judgment shall be reinstated. If the information is disclosed to McNeely after the hearing, the trial court shall set a briefing schedule for a renewed new trial motion on the question of whether the People have rebutted the presumption of prejudice and then decide the new trial on its merits on that point. If the renewed new trial motion is denied, the judgment shall be reinstated." (*Ibid.*)

Following remand, the trial court on McNeely's motion sent out the required notices to jurors in the case and received responses from all but one. Most of the responding jurors objected to being contacted and the trial court accordingly denied defense counsel's request for that information. However, the court granted McNeely's request with respect to four jurors who either did not object or did not respond, and disclosed those jurors' identifying information. The court then set the matter for hearing on a renewed motion for new trial.

McNeely filed his renewed new trial motion in February 2008. He did not state whether he had contacted or received any additional information from any juror; he stated only that "any impact on the deliberation process of the other jurors could not be adequately explored" and "although the rogue foreperson was one of the few jurors who consented to contact under [Code of Civil Procedure section] 237, any information he might contribute would necessarily be viewed as suspect and self-serving, given that he has already revealed himself as untrustworthy." Rather, McNeely reiterated his arguments that Juror No. 8's misconduct during voir dire gave rise to a presumption of prejudice and required reversal because the prosecution did not, and could not absent

input from other jurors, rebut the presumption.[2] He argued that in criminal cases, one tainted juror should compel reversal given the requirement for a unanimous verdict: "the simple fact that this foreperson alone was biased is sufficient to require a new trial because the Defendant was entitled to be tried by 12, not 11, impartial jurors." The People responded that without any new information, McNeely was placed in the same position as when the trial court had originally ruled that in spite of Juror No. 8's misconduct during voir dire, there was no showing of actual misconduct in the deliberations prejudicially affecting the verdict.

At oral argument on the matter, McNeely's counsel explained further that she did not include any information from the jurors for the trial court's review because it was not helpful in any way. She stated that one juror failed to remember anything, and the others, apart from Juror No. 8, refused to talk about the matter at the time they were contacted. She argued actual prejudice was shown merely by Juror No. 8's manipulative behavior. In doing so, she characterized our prior decision as "undermining . . . the trial court's findings" as to the absence of prejudice and holding that prejudice could never be assessed without actual information from the other jurors about what transpired in the

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[2] McNeely argued: "The foreperson's intentional omissions and misrepresentations during voir dire in this case undermined the entire jury process and tainted the verdict in this case. His flippant and demeaning commentary regarding the trial proceedings, the judge, counsel and the other jurors, as detailed in his blog writings[,] reveal his utter disdain for the judicial system and mock the Defendant, whom the jury foreperson referred to as 'Donald the Duck.' Given his intentional misrepresentations, his own admittedly hidden goals and manipulations, and his flagrant disregard for the judicial system in general and the Defendant specifically, this juror exhibited his bias repeatedly."

jury room. McNeely's counsel suggested that, because the other jurors had declined to provide information, there was no possibility of rebutting the presumption of prejudice.

The trial court denied McNeely's renewed new trial motion. It ruled, based on its evaluation of the entire record, there were grounds to conclude the People rebutted the presumption of prejudice. The court reinstated the judgment and McNeely's original prison term (amending the abstract of judgment as we had instructed in our prior opinion). McNeely appeals from the judgment.

DISCUSSION

I. *Standard of Review*

In assessing a trial court's order on a new trial motion based on juror misconduct, the California Supreme Court has set out varying standards of review. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225, fn. 7; see generally *People v. Ault* (2004) 33 Cal.4th 1250, 1260-1261, 1262, fn. 7.) In *Ault*, the court explained that because an order denying a new trial is not independently appealable but only appealable from the underlying final judgment, the reviewing court is obliged under the California Constitution to conduct an independent examination of the proceedings to determine whether a miscarriage of justice occurred and the defendant denied a fair trial. (*People v. Ault*, 33 Cal.4th at pp. 1260-1261, fn. omitted; see also *People v. Danks* (2004) 32 Cal.4th 269, 303-304; *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5 (*Nesler*).) In other cases, the high court has applied the abuse of discretion standard to trial court orders denying a new trial motion based on juror misconduct or juror bias. (See *Ault*, 33 Cal.4th at p. 1262, fn. 7; *People v. Carter* (2005) 36 Cal.4th 1114, 1207-1208, 1210

[assessing claim of juror misconduct during voir dire and rejecting it, stating " ' "[t]he determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears" ' "], quoting *People v. Williams* (1988) 45 Cal.3d 1268, 1318 [rejecting claim of juror misconduct based on allegations a juror consumed tranquilizers and engaged in a discussion regarding "religious aspects" of the penalty phase], modified on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 560-561; see also *People v. Navarette* (2003) 30 Cal.4th 458, 526.)

Nesler, *supra*, 16 Cal.4th 561 presents a scenario similar to the misconduct claimed in this case. In *Nesler*, the defendant moved for a new trial on grounds that during voir dire, a juror concealed biases and prejudices based on previously formed opinions or previously acquired information concerning the defendant. (*Id*. at p. 570.) The trial court denied the motion on grounds the juror's conduct did not prejudice the defendant. (*Id*. at p. 582.) Reviewing that decision, the high court stated, "We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citation.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination." (*Ibid*.) It noted that this standard was specifically to be used to assess *prejudice* from misconduct as opposed to whether or not misconduct had occurred, adopting the analysis of a lower court holding that "in reviewing an order denying a motion for new trial based upon jury misconduct, the reviewing court has a constitutional obligation to determine *independently* whether the misconduct prevented

the complaining party from having a fair trial." (*Id*. at p. 582, fn. 5.) *Nesler*'s independent review standard was applied to the claims of prejudicial juror misconduct made in *People v. Tafoya* (2007) 42 Cal.4th 147, 192 and *People v. Danks, supra*, 32 Cal.4th at pages 303-304. (See also *People v. Ault, supra*, 33 Cal.4th at pp. 1263-1264.)

We are not tasked here with determining whether Juror No. 8 committed misconduct; in our prior opinion we concluded the trial court's finding of misconduct on this record was supported by substantial evidence and neither party contests that issue in the present appeal. Rather, as in *Nesler, supra*, 16 Cal.4th 561, the relevant question is whether McNeely suffered prejudice from Juror No. 8's misconduct. Accordingly, we "independently determine whether, from the nature of [Juror No. 8's] misconduct and all the surrounding circumstances, there is a substantial likelihood [Juror No. 8] was actually biased, i.e., was unable to . . . render a verdict based solely upon the evidence received at trial. . . . We look to the entire record to resolve this issue, keeping in mind that the trial court has found the relevant historical facts and resolved the conflicting evidence, but that the question of prejudice is for our independent determination." (*Id*. at pp. 582-583.)

II. *McNeely's Contentions*

In this case, McNeely was not successful in convincing the consenting jurors (apart from Juror No. 8) to discuss the process of deliberations and he otherwise declined to supplement the record with Juror No. 8's input. Thus, the record before us is in the same state as when we first considered McNeely's claim that he was entitled to a new trial based on Juror No. 8's misconduct. This does not deter McNeely, who argues that he should be granted a new trial based on Juror No. 8's assertedly "pervasive" misconduct

that violated his right to trial by a fair and impartial jury. McNeely points to Juror No. 8's actions in concealing the fact he was a licensed attorney during voir dire, disobeying the trial court's admonitions by writing about the trial, forming tentative conclusions about his guilt before the jury commenced deliberations, and pressuring or at least encouraging the jury to reach its verdict through compromise or concession to expediency. For the latter two claims of misconduct, McNeely relies on Juror No. 8's blog posts, which he urges us to treat as a "reasonably accurate recitation of what went on in the jury room" or at least a "truthful reflection of Juror No. 8's opinion about McNeely and the trial."

We decline his invitation to do so. Our criticism of the trial court's analysis in our prior opinion turned on the court's reasoning which accepted as true Juror No. 8's blog writings in assessing the question of prejudice. As we stated previously, these writings cannot be treated as a transcript or a sworn declaration, and there is no evidence on this record permitting us to conclude Juror No. 8 was at all truthful or accurate in his writings. Nevertheless, we concluded in our prior opinion that substantial evidence supported the trial court's finding that Juror No. 8 committed misconduct by misleadingly if not falsely answering voir dire questions. (*McNeely, supra*, D048692, at [pp. 17-19].) On the record before us, that conclusion does not change.

" '[J]uror misconduct involving the concealment of material information on voir dire raises the presumption of prejudice,' and . . . '[t]his presumption of prejudice " 'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the

misconduct] . . . .' " ' " (*People v. Carter, supra,* 36 Cal.4th at p. 1208; see also *People v. Williams* (2006) 40 Cal.4th 287, 334; *In re Hamilton* (1999) 20 Cal.4th 273, 296; *In re Carpenter* (1995) 9 Cal.4th 634, 653; *In re Hitchings* (1993) 6 Cal.4th 97, 119 (*Hitchings*).) The pertinent question here is whether, under the standard of review set forth above, we may conclude the People rebutted the presumption of prejudice arising from Juror No. 8's misconduct in this respect. In *McNeely, supra,* D048692, we implicitly held that absent actual evidence that Juror No. 8 pressured or encouraged jurors to reach their verdicts, or exercised some other undue influence on the jury's deliberations, the People met that burden. Hence, our disposition instructed the trial court to reinstate the judgment if juror information was not forthcoming.[3]

Because following remand the trial court released some of the juror's personal information, our disposition in *McNeely, supra,* D048692 required it to consider and rule on McNeely's renewed new trial motion. It did so, concluding on the unchanged record before it that the People rebutted the presumption of prejudice. McNeely contends the court erred in this ruling. He argues Juror No. 8's concealment of pertinent information on voir dire was intentional and provides an indication that he was actually biased; indeed, relying in part on *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548 (*McDonough*), *Hitchings, supra,* 6 Cal.4th 97, and *Dyer v. Calderon* (1998) 151 F.3d 970, McNeely asks us to presume bias and find so-called "structural error" based on

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3 In reaching this disposition, we presumed that if a juror were provided notice of a party's desire to obtain his or her personal information and thereafter did not object to disclosure, that the juror would also be likely to discuss matters with that party.

the fact the juror lied to secure a seat on the jury. He further maintains, as he did below, that in the absence of information from other jurors, the presumption of prejudice cannot be rebutted as a matter of law.

III. *McNeely Was Not Denied His Rights to an Impartial Jury or Fair Trial As a Result of Juror No. 8's Misconduct*

We have no quarrel with the notion that actual bias of a single juror implicates a criminal defendant's right to a fair trial. (*Nesler*, *supra*, 16 Cal.4th at p. 578; *In re Carpenter*, *supra*, 9 Cal.4th at p. 652; *Hitchings*, *supra*, 6 Cal.4th 97, 110; see *U.S. v. Martinez-Salazar* (2000) 528 U.S. 304, 316-317; *McDonough*, *supra*, 464 U.S. at p. 554.) McNeely, however, asks us to conclude that Juror No. 8's intentional dishonesty during voir dire, combined with his blog writings, *necessarily* demonstrates his inability to be impartial. He asks us to equate Juror No. 8's misconduct to bias. The record does not permit this conclusion.

Our independent review of the record indicates that while Juror No. 8 certainly concealed information during voir dire, that information (as to the details of his present career, his status as a licensed attorney, and the fact he did legal work in his role) was not the sort that would reflect some sort of lack of impartiality or bias against McNeely. This is not a case like *Hitchings*, *supra*, 6 Cal.4th 97 where a juror lied during voir dire by failing to disclose prior knowledge of the defendant's case and expressed pretrial opinions about the defendant's guilt before her selection as a juror. Nor is this a case where Juror No. 8 failed to disclose some involvement (as a victim or otherwise) in the same type of crimes McNeely was alleged to have committed. (E.g., *People v. Diaz* (1984) 152

Cal.App.3d 926, 934-936 (*Diaz*) [juror in case involving a defendant charged with assault with a deadly weapon, a knife, concealed the fact she had been assaulted at knifepoint during an attempted rape 13 years before despite having been specifically asked]; *Dyer v. Calderon*, *supra*, 151 F.3d at pp. 973-983 [juror in murder trial concealed the fact her brother had been murdered]; see *People v. San Nicolas* (2004) 34 Cal.4th 614, 646-648 [distinguishing *Diaz* and *Dyer v. Calderon* as cases affirmatively evidencing juror bias].)

We acknowledge that the court in *Hitchings* adopted broad statements suggesting that a juror's concealment during voir dire invariably raises an issue of bias. (*Hitchings*, *supra*, 6 Cal.4th at p. 120 ["when a juror conceals material information on voir dire, 'that information establish[es] substantial grounds for inferring that [the juror] was biased . . . despite . . . protestations to the contrary' "], citing *People v. Price* (1991) 1 Cal.4th 324, 400-401 & *People v. Morris* (1991) 53 Cal.3d 152, 183-184 ["Concealment by a potential juror constitutes implied bias justifying disqualification"], overruled on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) McNeely relies on those statements to argue we must conclusively presume Juror No. 8's bias. But *Hitchings* is grounded on the notion that in order to impact the critical safeguard of the peremptory challenge process, a concealment should relate "to questions bearing a substantial likelihood of uncovering a strong potential of juror bias . . . ." (*Hitchings*, 6 Cal.4th at pp. 111-112, quoting *Diaz*, *supra*, 152 Cal.App.3d at p. 932; see also *McDonough*, *supra*, 464 U.S. at p. 556 [plurality of justices held that to obtain a new trial based on a juror's dishonest answer to a voir dire question, the party must demonstrate that a correct response to the question would have provided a valid basis for a challenge for cause;

"[t]he motives for concealing information may vary, *but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial*" (italics added)]; *People v. Carter*, *supra*, 36 Cal.4th at p. 1208, fn. 47 [declining to decide whether juror's concealment of information must be intentional, but observing that *McDonough* holds that even an intentionally dishonest answer is not fatal provided that the falsehood does not reflect a lack of impartiality]; *United States v. Bishop* (5th Cir. 2001) 264 F.3d 535, 555 ["[A] juror's non-disclosure . . . is not a basis for reversal unless the dishonesty appears to be rooted in bias or prejudice"].)

The cases on which *Hitchings* relied involved nondisclosures allowing the court to infer the juror harbored ill feelings amounting to bias, akin to the sort of nondisclosures in *Hitchings*. In *People v. Price*, involving the defendant's challenge to removal of a juror, the juror had failed to disclose he had served a sentence for assault with a dangerous weapon and was paroled in California where he was supervised by a prosecution witness in the proceeding at issue, and also that he was thereafter in 1976 charged with assault with a deadly weapon, which was dismissed against the then district attorney who was the trial judge in the proceeding at issue. (*Price*, 1 Cal.4th at pp. 399-400.) *People v. Morris* involved a juror's failure to disclose convictions for misdemeanor offenses including drunk driving, and the fact he had been charged of obstructing and resisting an officer. (*People v. Morris*, 53 Cal.3d at pp. 183-184.) Indeed, the appellate court in *Morris* observed that apart from the concealment, the prosecutor had advised the court he had personally prosecuted that juror for some of the charges, permitting an inference of bias. (*Id*. at p. 184.)

We disagree with McNeely's assertion that the presumption of prejudice cannot be rebutted without information from the other jurors who declined to discuss the matter. The argument is based on McNeely's faulty assertion that Juror No. 8's writings must be deemed truthful or accurate, and it misreads our prior opinion.

Under the totality of the circumstances shown by this record, even when we factor in McNeely's decision to write in his blog during trial on one day about matters he had been instructed not to disclose, we conclude the evidence does not raise a "substantial likelihood" that Juror No. 8 (or any other juror) was actually biased against McNeely. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 296; *People v. Danks*, *supra*, 32 Cal.4th at p. 304; *People v. Carpenter*, *supra*, 9 Cal.4th at p. 654.) "[B]efore a unanimous verdict is set aside, the likelihood of bias under either test must be *substantial* . . . . [T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness. [Citation.] Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic." (*Danks*, at p. 304, quoting *Carpenter*, 9 Cal.4th at pp. 654-655.) Here, the trial court correctly concluded the presumption of prejudice was rebutted. McNeely is not entitled to a new trial.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.